Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-8331

GUSTAVE CARL GALAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

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TO THE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in United States of America vs. Gustave Carl Galas, No. 74-3086, predicated upon the following:

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1), petitioner having asserted below deprivation of rights, secured by the Constitution of the United States. Petitioner filed a motion with this Court for an extension of time in which to file a petition for a writ of certiorari. On November 13, 1975, the Honorable William J. Brennan, Jr. entered an order extending the time for filing a petition for certiorari up to and including December 15, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and the Sixth Amendments to the Constitution of the United States.

STATEMENT

Petitioner was indicted on April 15, 1974 and was arraigned and entered a plea of not guilty on May 13, 1974.

On August 16, 1974 he was found guilty on all four counts of the indictment.

On September 23, 1974, after denial of his motion for new trial, petitioner was sentenced to the custody of the Attorney General for two years, on each count, to run concurrently.

Timely Notice of Appeal was filed and on October 16, 1975 the United States Court of Appeal, for the Ninth Circuit, affirmed the conviction.

A copy of the unpublished Order affirming is appended hereto as Appendix "A".

QUESTION PRESENTED

Does the Court below's refusal to grant a short continuance for an incapacitated attorney amount to denial of petitioner's right to counsel under the Fifth and Sixth Amendments to the Constitution of the United States?

ARGUMENT

Petitioner was indicted on April 15, 1974, charged with violations of 26 U.S.C. 7206(2), assisting and counseling in the preparation of an income tax return which was false and fraudulent as to a material matter. On May 13, 1974, petitioner entered a plea of not guilty. On August 4, 1974, petitioner's retained counsel, James P. Cantillon, received a severe injury to

his right eye, received emergency treatment on August 4 and August 5, 1974 (C.T. pp. 58-59). Michael Gurdin, M.D. prepared a declaration under penalty of perjury verifying that Mr. Cantillon will be disabled from work for approximately seven to fourteen days (C.T. p. 60). On August 5, 1974, an attorney appearing for James Cantillon moved for continuance after the affidavits were filed with the Court. The Court denied the said motion and ordered counsel to return on August 6, 1974 for selection of jury, and Court may grant short continuance (C.T. p. 61). The jury was selected and the matter trailed to August 8, 1974 at which time Attorney Cantillon moved for continuance or for severance of petitioner. The said motion was denied and the matter ordered continued on August 9, 1974 at 9:00 A.M. for further jury trial.

That on August 8, 1974 Attorney Cantillon filed an affidavit indicating that due to his disability he was required to take three drugs which impaired his mental alertness, causing him to stagger, have a lethargic, depressed feeling, causing confusion, drowsiness and memory impairment. That no other attorney was knowledgeable enough to effectively represent petitioner in the trial and that affiant could not competently represent defendant during the trial as he suffered impairment of vision and vertigo (C.T. p. 65).

The affidavit of Warren O. Cagney, Jr., M.D., stated:

> "If a patient is under the influence of these drugs under no circumstances should he perform any jobs or acts that require mental alertness or memory recall. In fact, if an attorney attempted to represent a client while under the influence of these drugs, it would be my opinion that he could be held for gross malpractice.
>
> "I most sincerely feel that Mr. Cantillon cannot perform his job as an attorney properly while taking these medications. It would be at least one week before the total effects of the drugs will wear off.
>
> "Further, affiant says not."
> (C.T. p. 69.)

In spite of all of these affidavits, the Court forced petitioner to continue trial with counsel, that due to the injury and the drugs in his system was incompetent.

On August 8, 1974 the following colloquy took place in the presence of the jury:

> "THE COURT: In the case of United States vs. Galas and others let the record show that all the members of the jury are in their places and the defendants and counsel are before the Court.

"MR. CANTILLON: May I approach the podium, your Honor?

"THE COURT: Yes.

"MR. CANTILLON: Your Honor, I filed two affidavits this morning relative to my physical condition, and I would request that the Court act favorably upon them, either continue this matter or sever Mr. Galas out. I cannot go to trial, and with all due respect to the Court, will not go to trial in my present condition.

"I am suffering severe headache, vertigo, I'm taking heavy doses of drugs, memory-effecting, emotionally-effecting, and I think it would be malpractice for me to attempt to represent Mr. Galas. I think I have no right to go to trial in my present condition, and no question in my mind Mr. Galas would not be effectively represented by counsel.

"THE COURT: Mr. Cantillon, this condition is not new. It seems to certainly be something that you were aware of some several days now. This case has been continued since, I think May or so because of your hospitalization, and a result of other matters, and your office is not a

one-man office. There are other lawyers in your office who could and probably are prepared to proceed in this case.

"MR. CANTILLON: There are no other lawyers in my office prepared to proceed in this case, your Honor. There is one other lawyer that works for me, Mr. Wayne Anthony, who appeared in connection with continuing the matter in May. He practices with me.

"THE COURT: Is Mr. Anthony here?

"MR. CANTILLON: Yes, he is here in court, your Honor.

"THE COURT: Let Mr. Anthony proceed with the trial of the case.

"MR. CANTILLON: Mr. Anthony is not in any position to proceed with the case; he knows no more about the case than the jurors know at this time, your Honor.

"THE COURT: Mr. Cantillon, if Mr. Anthony does not know anything about the case I consider it negligence on your part that you have not had him acquaint himself with the case.

"MR. CANTILLON: Well, I hope your Honor understands that until Sunday last I was prepared to proceed with this case. The injury I sustained, I sustained on Sunday, Sunday afternoon, required emergency treatment Sunday and Monday, and as a matter of fact, I have an appointment at 10:00 this morning with the doctor for further treatment of the eye. It's not an injury that is a slight injury.

"I've been before your Honor on many occasions before. I believe I've appeared before almost every judge in this District Court and never that I can recall sought a continuance except on one occasion, and that was because I was in the middle of a trial in the State court. We picked the jury because it was, as I recall, a State holiday, election day, and we trailed the case three or four days, at the conclusion of which we commenced the trial. That happened to be the Friar's Club case, with which the Court may be familiar. I am not seeking to delay the trial --

"THE COURT: I don't want anyone in this courtroom to think that I believe that you are misrepresenting the facts of your physical condition, but when this case first came to this court, and it must have been May or

April, someone from your office came in to say that you were in the hospital, and when I continued it a month until you were able to come out, and if I remember the facts correctly, it was necessary for it to be continued again after then because of either your continued hospitalization or some other personal problem that you had.

"MR. CANTILLON: I was hospitalized April the 4th, 1974 until, I believe it was July 16th, with two brief periods --

"THE COURT: This case, whereas the ordinary case is tried within 30 days in this court at the time of the taking of the plea, it must be at least four months now away from that date, and this case is going to trial this morning, and I am not going to compel you to remain here, but I am going to compel Mr. Anthony to represent your client.

"MR. CANTILLON: Well, your Honor, I don't think Mr. Anthony could be compelled to represent my client because he is not in a position to represent my client.

"THE COURT: Mr. Anthony is, by the order of this Court, directed

at this moment to represent your client.

"Where are you, Mr. Anthony? Come forward and take your place at the counsel table, sir.

"MR. CANTILLON: Well, your Honor, at the risk of being in contempt of this court, I'm going to tell Mr. Anthony --

"THE COURT: Before you go any further, Mr. Cantillon, your risk is a decided one. It is a risk that I will not countenance, and I will not have you flount the orders of this court. So, if you are about to say that you are not going to let Mr. Anthony remain here with your client I shall see to it that either you or Mr. Anthony or both of you are severely punished if Mr. Anthony does not take his place at this counsel table.

"Be seated, sir, and take your place.

"MR. CANTILLON: Mr. Anthony -- one moment, your Honor --

"THE COURT: Call a Deputy Marshal to this courtroom, Mr. Bailiff, immediately.

"MR. ANTHONY: Your Honor, may I be heard?

"THE COURT: Ladies and gentlemen of the jury, will you please discuss nothing about this case, and will you please step down and go into the jury room until you are summoned again." (R.T. p. 7, line 3 - p. 11, line 8.)

"MR. CANTILLON: I think Mr. Anthony said he wanted to be heard.

"THE COURT: Mr. Anthony.

"MR. ANTHONY: Yes, your Honor. I just want the record to indicate -- may I speak here from the counsel table?

"THE COURT: Yes.

"MR. ANTHONY: I have not done anything in this case other than appear, and I wish to correct the Court, I believe it was only one continuance granted in this case, and that was the one in June because of Mr. Cantillon's health. I am not familiar with the facts of this case. I know nothing of the law covering this case, I am not even familiar with the income tax regulations and the law pertaining thereto.

"Furthermore, that because Mr. Galas retained Mr. Cantillon to represent him and has throughout these proceedings told Mr. Cantillon as well as myself that he wanted no one to represent him but Mr. Cantillon, on that basis I have not done anything in preparation for this case, only Mr. Cantillon has.

"THE COURT: Mr. Cantillon is invited to sit by you at this counsel table and to proceed and to advise you and to do anything else that is necessary for the continued progress of this case. But it is going to proceed from this point, and you gentlemen might just as well make up your mind about it.

"MR. ANTHONY: Your Honor, one other thing I would like to state to the Court; some six months ago I made arrangements to be in Milwaukee, Wisconsin this weekend. I am to leave tomorrow.

"THE COURT: Your plans must be changed, sir. I'm very sorry to have to be a party to that, but this is a multi-defendant case, other lawyers are involved, the Government's witnesses have come from other states, is that correct, sir?

"MR. WILSON: Yes, your Honor.

"THE COURT: How many witnesses will you have?

"MR. WILSON: We will have about 12 witnesses, your Honor.

"THE COURT: And are they from other states?

"MR. WILSON: Yes, and those that are from California are from some distance from Los Angeles, out in the desert, your Honor.

"THE COURT: Yes, I'm sorry, gentlemen, but if I sound more firm than I should sound, I find that there is sufficient reason for doing so. This case must proceed to trial.

"DEFENDANT GALAS: May I be heard on this matter, your Honor?

"THE COURT: No, sir. Be seated, please.

"Seat the jury, Mr. Bailiff."
(R.T. p. 11, line 20 - p. 13, line 19.)

It is clear from the discussion between the Court and counsel that there was no question in the Court's mind as to Mr. Cantillon's disability

and it is also clear that the disability is one that occurred two days prior to the matter being called for trial and was not foreseeable by petitioner or Mr. Cantillon. Mr. Cantillon's assistant, Mr. Anthony, stated clearly on the record that he knew nothing about the facts of the case or the law involved, and the Court was firmly informed by Mr. Cantillon that Mr. Anthony knew no more about the matter on trial than the jurors at that time.

The affidavits of the doctors indicated in very strong language, as heretofore cited, that Mr. Cantillon was in no physical condition, or did he have the mental ability to try the case below.

In Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, stated at page 382:

"It is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'"

The Sixth Amendment to the Constitution of the United States guarantees the right of an accused to be represented by counsel and the Fifth Amendment guarantees due process, which in Powell and succeeding cases has been held to include "effective counsel."

The finest, most experienced advocate in the nation, if crippled by illness and befogged by drugs, will be ineffective.

In a line of California cases, including People v. McDowell, 69 Cal.2d 737, Powell v. Alabama is cited for the proposition that a constitutional right of "effective representation" is required. Here, a case in which the arraignment took place in the middle of May could have been continued for a week or two to permit the injuries of Mr. Cantillon and the effects of the drugs used in treating them to dissipate. The refusal of the Court to grant the short continuance requested by petitioner and amply supported by the affidavits of the doctors and Mr. Cantillon, as well as the discussion in open Court, was a flagrant abuse of discretion effectively denying counsel to petitioner.

In Reynolds v. Cochran, 365 U.S. 526, 81 S.Ct. 723 this court stated:

"In Chandler v. Fretag, we made it emphatically clear that a person proceeded against as a multiple offender has a constitutional right to the assistance of his own counsel in that proceeding. Under the facts of this case, as alleged

in the petition filed before the Florida Supreme Court, the decision in Chandler is squarely in point and controlling. Under those facts, the statement of this Court in Powell v. State of Alabama, which provided the basis of our holding in Chandler, is wholly applicable: 'If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.'

"The State seeks to avoid the application of the holding in Chandler on the basis of a contention that even if it was error for the trial judge to deny petitioner's motion for a continuance, that error was harmless under the facts of this case. The argument offered in support of this contention is that since petitioner admitted the only fact at issue in the proceeding - that he had been convicted of a previous felony in 1934 as charged in the information - a lawyer would have been of no use to him. We find this argument totally inadequate to meet the decision in Chandler. Even assuming, which we do not, that the deprivation to an accused of the

assistance of counsel when that counsel has been privately employed could ever be termed 'harmless error,' it is clear that such deprivation was not harmless under the facts as presented in this case. In the first place, petitioner asked for a continuance to enable him to consult with counsel before he admitted the truth of the charge of prior felony conviction. Thus, if petitioner had been allowed the assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple-offender proceeding."

In Hoyt v. State of Florida, 368 U.S. 52, 82 S.Ct. 157 this court held that denial of counsel at the time of arraignment required reversal of conviction even though no prejudice was shown. A fortiori, an effective denial of counsel at the time of trial must require a reversal of the conviction. Here, however, much prejudice can be shown by the failure of counsel for petitioner below to effectively defend him at the trial. The court, in effect, sacrificed the rights and interests of petitioner to the expediency of the calendar of the District Court.

The following colloquy occurred in open court:

"MR. CANTILLON: You see the position you are placing us in,

your Honor.

"If I may be respectfully so, you are placing us in a condition we can do nothing other than just sit here during this trial and, in effect, it's going to be no trial as far as Mr. Galas is concerned. Mr. Anthony is not in the position to try the case; he is not in the position to participate in the proceedings, he knows nothing about it. I, obviously, am not in position to proceed in the case, and I think to compel us to sit here and -- you could sever Mr. Galas out.

"THE COURT: I have no intention of doing that, Mr. Cantillon. We are going to proceed with this case, and I'm aware of the fact that you are due in Judge Curtis' court next Tuesday on a case that he has had to continue many times for the last, almost eight months, and he is quite disturbed that you allowed a jury to be picked in this case without notifying me of your appearance before him in a multi-defendant case with many lawyers involved that is set for next Tuesday. And I promised him that I would speed this case along as expeditiously as possible in order to free you for his court next week.

"MR. CANTILLON: That information was conveyed to this court and the Court may not recall that, but at the time this case was set I was in the hospital. Through inadvertence the case was set for August 3rd, I believe. Is that correct, Mr. Anthony?

"MR. ANTHONY: Your Honor, I appeared here on the -- prior to the date of trial that this case was set for in June, and then I again appeared on the date of trial to seek a continuance. At that time we filed an affidavit with the Court informing the Court of Mr. Cantillon's condition, also informing him of the calendar problems that he had in August, including in that affidavit a statement that he was due to start trial in Judge Curtis' courtroom on August the 3rd.

"THE COURT: I could not be expected to remember all of those facts in an affidavit filed sometime in August.

"I think it was incumbent upon Mr. Cantillon or the person who was here representing him at the time this jury was selected last Tuesday to have called those matters to my attention. But we are wasting time, gentlemen, we are proceeding, so let's proceed.

"Seat the jury, Mr. Bailiff.

"MR. CANTILLON: Well, I want it clearly understood, your Honor, that this is over our objection.

"THE COURT: Yes, the record will so show.

"MR. CANTILLON: In our opinion Mr. Galas is being deprived of due process of law.

"THE COURT: I refuse to believe that a lawyer in your office who has been there, especially if it's only a two-man office, that has been there during all the time that this case has been in your office, knows nothing about the case. I refuse to believe that, and I was a part of a two-man office during the time I practiced law.

"MR. CANTILLON: It may be a two-man office but we are not a one-case office, and I think that is the explanation.

"DEFENDANT GALAS: May I be heard with respect to that?

"THE COURT: No, sir.

"Please be seated, Mr. Cantillon." (R.T. p. 14, line 13 - p. 16, line 21.)

The record is replete with failure of Mr. Anthony and/or Mr. Cantillon to object to hearsay, to lack of foundation, speculation, argumentative questions, conclusions of law or fact, to the testimony elicited by the government, and the various witnesses or defendants.

Although a case involving these statutes involves complexities often unintelligible to the layman, counsel for the defense proposed no questions to be asked the prospective jurors on voir dire. They requested no special instructions which would have clarified the law and benefited the petitioner herein.

Government's Exhibit 2, a purchase offer, was presented to the government witness, Dr. McAdams (R.T. p. 39, line 19-26). There was no objection to lack of foundation to testimony that petitioner wrote a portion of the document. There was no information elicited to show that Dr. McAdams either recognized the handwriting or saw it written by petitioner. This was, of course, in direct dispute in the trial. There were statements made by co-defendants, outside of petitioner's presence; there were no objections interposed as to the question of admissibility as to petitioner (R.T. p. 51, line 17-20).

At the point where the government moved into evidence certain exhibits, Mr. Cantillon stated, in effect, that he would be unable to look at and analyze the exhibits (R.T. p. 58, lines 8-16).

Again, indicating, that due to his illness and the effects of the drugs upon his abilities, he would be unable to intelligently analyze the exhibits as to the question of admissibility. Mr. Anthony had stated, and Mr. Cantillon had stated, on the prior cited occasions, that he, Mr. Anthony, knew neither the law nor the facts sufficiently to acquaint himself with the effect of these documents. After looking at the documents, Mr. Anthony stated:

> "MR. ANTHONY: Over the noon recess I attempted to review these documents, these Government's exhibits. I have been unable to make a lot of sense out of a lot of them, I'm unfamiliar with a lot of forms that are being used. I also had an opportunity to talk to Mr. Galas about this matter. He expresses the desire, would like to express the desire to the Court that he does not want me to represent him.
>
> "I further would like to at this time explain to the Court what my experience is so that the Court can consider my ability to go forward as his counsel in this case.
>
> "THE COURT: Counsel, I am not going to hear you on this any more. Mr. Cantillon is in court with you, Mr. Galas is a lawyer, and I see no reason to believe that Mr. Galas is not going to be adequately represented

> by you. And I'm going to give him an opportunity, if he cares to, to ask questions on cross examination of any witness that appears in this case. I'm not going to prolong this case with bellyaching every time we take a recess. So please retire to the counsel table." (R.T. p. 73, lines 16-25 and p. 74, lines 1-9.)

To further indicate Mr. Cantillon's incapacity, when cross examining Dr. McAdams about an organization in which he and petitioner were involved according to some evidence, asked:

> "Q. It's an organization that specializes in teaching people with high income sophisticated methods of evading or avoiding the payment of income tax, correct, through a tax shelter method?
>
> "A. Yes." (R.T. p. 127, lines 22-25 to p. 128, line 2.)

Certainly, no counsel who had all of his faculties would imply that his client was involved with an organization teaching sophisticated methods of evading payment of tax; therefore, this must have been done unwittingly, especially the use of the word "evading."

The entire conduct of the Court as shown in the previously quoted portions of the transcript indicates a bias toward petitioner and a flaunting of his constitution right to counsel which cannot be

excused in protecting the sanctity of the Court's calendar.

The effect upon the jury of the statements of the Court certainly cannot help but militate against the interests of petitioner.

It is submitted that a healthier Richard Cantillon utilizing the normal skills of an advocate in the Federal Court could probably have obtained an acquittal for petitioner. Nowhere in the reported cases can we find any instance of a court's agreeing that counsel is injured and disabled, and where uncontradicted proofs of inability due to the effect of drugs prevents a fair representation of a client, where defendant has been forced to trial.

CONCLUSION

For all of the reasons hereinabove set forth, factual and legal, it is respectfully submitted that the judgment be set aside as to all four counts, and the conviction reversed.

Respectfully submitted,

HERBERT E. SELWYN

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GUSTAVE CARL GALAS, Defendant-Appellant.	)	No. 74-3086 ORDER

[October 16, 1975

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and ELY, Circuit Judges, and SHARP,* District Judge.

We are satisfied from an examination of the record that appellant was afforded fully effective assistance of counsel. We do not reach appellant's challenges to the sufficiency of the evidence as to Count IV, since the sentence imposed on that count is to run concurrently with the same sentence on other counts.

Arrifmed.

*Honorable Morell E. Sharp, United States District Judge, Western District of Washington, sitting by designation.

Supreme Court, U.S.
FILED
FEB 19 1976
MICHAEL RODAK, JR., CLERK

No. 75-833

In the Supreme Court of the United States

OCTOBER TERM, 1975

GUSTAVE CARL GALAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-833

GUSTAVE CARL GALAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was deprived of the effective assistance of counsel because the trial court denied a continuance requested because of an alleged eye injury his counsel suffered at the outset of the trial.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on four counts of willfully assisting in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). He was sentenced to concurrent two-year prison terms on each of the four counts (I-R. 89).[1] The court of appeals affirmed by order (Pet. App. A).

The proof showed that petitioner, a lawyer, and his two co-defendants, a certified public accountant and a beaver salesman, joined together to induce high-income taxpayers

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[1]"R." refers to the record in the court of appeals.

to invest in beavers as a tax shelter. The annual depreciation of the beavers provided the purported tax deduction. While depreciation is ordinarily deductible, the evidence showed that petitioner encouraged the fraudulent abuse of this deduction through the device of backdating purchase contracts. The result was that the taxpayers whose returns petitioner prepared claimed a full year's depreciation for beavers for years in which they did not in fact own the beavers, or in which they owned the beavers for only a short period of time.

Petitioner was arraigned on May 7, 1974, and appeared with Wayne Anthony, an associate of his principal counsel, James P. Cantillon. The trial was set for June 11, 1974. On June 7, 1974, appearing again with Anthony, petitioner moved for a continuance, based partly upon the ill health of Cantillon. The court indicated that it would consider a two-week continuance (I-R. 16, 86). On June 11, 1974, the original trial date, petitioner moved for a continuance. The court reluctantly granted a continuance of nearly two months, with the warning that the trial would proceed on August 6, 1974. The court further warned petitioner that if, for some reason, Cantillon would not be available to represent petitioner, then petitioner should retain other counsel or have the court appoint counsel for him (I-R. 86-87).

On August 6, 1974, petitioner again moved for a continuance based upon an alleged eye injury sustained by Cantillon on August 4, 1974. After observing the state of Cantillon's health, the district court directed that a jury be selected on August 6, 1974. The court directed Anthony to remain throughout the trial as Mr. Cantillon's co-counsel. Petitioner, himself an attorney, was granted the privilege of participating in his own defense by examining witnesses. The trial commenced two days later, on August 8, 1974 (I-R. 87; II-R. 7-14).

1. It is well established that the granting or refusing of a continuance rests within the discretion of the trial court. See, *e.g.*, *United States* v. *Makley*, 468 F.2d 916, 917 (C.A. 9); *United States* v. *Young*, 470 F.2d 962, 964 (C.A. 9), certiorari denied, 410 U.S. 967, and cases cited therein; *United States* v. *Casey*, 480 F.2d 151, 152 (C.A. 5), certiorari denied, 414 U.S. 1045. Here, the record refutes petitioner's claim that the district court abused its discretion. The crucial physician's affidavit submitted in support of the motion for continuance (I-R. 68-69) was largely hearsay and was prepared by a doctor who neither prescribed to nor treated Cantillon for the alleged injury to his eye. Moreover, there were compelling reasons for continuing with the trial. As the trial court pointed out, "this is a multi-defendant case, other lawyers are involved, the Government's witnesses have come from other states * * *" (II-R. 13).

The basic flaw in petitioner's position is that it fully accepts his counsel's claim that he was unable to proceed effectively because of the alleged injury to his eye and the effects of the drugs he was allegedly taking. But it is quite clear from the record that the trial court never believed petitioner's counsel Cantillon and that the court observed him with great care in order to insure that he was in no way incapacitated. Thus, in denying the motion for new trial and referring to the condition of counsel's eye at the beginning of the trial, the court stated (VI-R 921):

> Now, I must say that I think I have known you long enough, Mr. Cantillon, to know when you are aching and when you are acting, and I think that you were acting.

The court continued (VI-R. 922):

> ***[Y]ou appeared in court with what appeared to the Court to be a black eye, and once you found that

you were not going to get a continuance of this case, you summoned immediate renewal of vigor, and you employed your usual fine trial technique. And I watched this case very closely to be sure that there would not occur a time when this defendant was less than adequately represented, and I can honestly say to him and for this record that he had a fine lawyer representing him, one, that is, that did not so far as I was concerned, suffer from anything that rendered him less than almost admirably capable of giving legal representation to his client.

Moreover, at the end of the third day of the trial, at the time petitioner's counsel was suffering from his alleged eye injury, the following exchange took place (IV-R. 486-487):

THE COURT: At the beginning of the trial I made an order from the bench that Mr. Anthony must remain at all sessions of this trial. I made that order because I desired to have a back-up lawyer, if not better than that for Mr. Galas. It appears during the events that have followed that Mr. Cantillon's health has remarkably improved and he has represented his client in his usual very skillful manner, and I don't think we need Mr. Anthony's presence here any more unless Mr. Galas or Mr. Cantillon desire him to be here. So at least for the purposes of the record, I recant the order requiring Mr. Anthony to attend future sessions of this trial.

MR. CANTILLON: Very well, that is what I was going to move for, your Honor.

In light of the foregoing, the court of appeals correctly concluded that an examination of the record demonstrated that petitioner "was afforded fully effective assistance of counsel" (Pet. App. A).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

Supreme Court, U. S.
FILED
MAR 4 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-833

GUSTAVE CARL GALAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES, RESPONDENT, IN OPPOSITION

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I

PRELIMINARY

It is the position of the Petitioner, that by this Reply to Memorandum for the United States

in Opposition (hreinafter referred to as "MEMORANDUM") that Petitioner, rather than abandoning his contentions of the denial of the effective assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, and under due process clause of the Fourteenth Amendment to the United States Constitution, hereby reaffirms his legal position as coruscatingly set forth and supported by the entire Record in this case.

Petitioner intends, if and when a Writ of Certiorari is granted, to file his Brief, in depth, if deemed advisable, and in accord with the Supreme Court Rules to reflect that, as a matter of Fact and Law, the entire Record in this case supports the posit of Petitioner and patently establishes the abuse of discretion by the trial Judge in denying Petitioner a short continuance or severance to facilitate his Counsel's recovery to afford Petitioner the assistance of effective counsel.

With a broad general allusion in the Memorandum, the Solicitor General for the United States ignores the actual crucial dilemma of Petitioner at the trial, by by-passing the critical colloquy in the presence of the jury and by reference to facts which are not supported by the Record, and by citation of cases not applicable or pertinent to the facts in the Record or within the concept of the law, applicable to this case.

II

THE FACTS REFERRED TO BY THE SOLICITOR GENERAL ARE NOT SUPPORTED BY, NOR IN ACCORD WITH THE RECORD OF THE CASE

(a) Respondent states (Memorandum p. 1 - par. 1), that Petitioner " - - was deprived of effective counsel because the trial court denied a continuance requested because of an alleged eye injury -- " [Emphasis ours].

Counsel for Petitioner filed two affidavits, the morning of August 8, 1974, with the trial court relative to his physical condition (R. 2 - p. 7, lines 3-22).

In the affidavit of August 5, 1974, Mr. Cantillon, trial counsel for Petitioner stated (Clerk's Transcript, hereinafter referred to as C. Vol. 1 - p. 58):

> "1. On the 4th day of August, 1974, I sustained severe injury to the region of my right eye as a consequence of which my vision is substantially impaired.
>
> "2. I am counsel of record for Gustave Carl Galas.
>
> "3. I received emergency treatment from Michael Gurdin, M.D. on

August 4, 1974 and again on August 5th. I am attaching herewith a certificate signed by Dr. Gurdin confirming my disability.

"4. I am making this affidavit for the purpose of obtaining a continuance of the within case, in accordance with the certificate of Dr. Gurdin for the period of seven to fourteen days.

"5. I am taking antibiotic and sedative medication. I am willing to submit myself to any examination by any court appointed physician, if there is any question regarding the authenticity of this affidavit. [Emphasis ours]

Further, Affiant says not.

/s/_____
James Cantillon

Subscribed and
sworn before me
this 5th day of August, 1974
Thomas D. Mercola
Notary Public."

On the same day, August 5, 1974, Dr. Michael Gurdin made his certificate, "He will be disabled from work for approximately seven to fourteen days." (C.T. 1, p. 60.)

A second affidavit was filed by Mr. Cantillon, dated August 8, 1974 (C.T. 1, pp. 65-66).

"AFFIDAVIT OF JAMES P. CANTILLON (C.T. Vol. 1 - pp. 65-66) as follows:

"STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

"JAMES P. CANTILLON, being first duly sworn, deposes and says:

"1. That he is the attorney of record for the defendant GUSTAVE CARL GALAS in the above entitled criminal proceeding. That he executed and filed an affidavit with the court on August 5, 1974, setting forth medical reasons for his inability to proceed to trial. That the court refused to grant the defendant a continuance but rather is forcing him to trial with affiant as counsel.

"2. In addition to those matters set forth in affiant's affidavit filed on August 5, 1974, affiant by this affidavit informs the court of his disability being caused not only by the injuries he sustained, but by the medication which he has been compelled to take.

"3. Affiant is presently taking valium, Darvon, Dalmaine and Cleocin. That Valium is a tranquilizer which acts as a depressant to the central nervous

system. That Dalmaine is a hypnotic and sedative to induce sleep. That Darvon is 'a pain killer.' The combination of these three drugs has induced a condition which has impaired the affiant's mental alertness, caused him to stagger on occasion, has induced a lethargic and depressed feeling, has caused the affiant to become confused and has induced drowsiness and memory impairment.

"4. That the affiant is not a medical expert but in that regard would refer the court to the Physician's Desk Reference (PDR) which explains the pharmacology and effects of the above mentioned drugs. That affiant's doctor informs him that the effect of each of the above three mentioned drugs is accentuated when they are taken in conjunction with one another. In other words, each of the above drugs potentiates the others.

"5. That all of the above described medication has been prescribed for me by my physician and has been administered by the affiant according to the doctor's instruction in the prescription.

"6. That no other attorney is knowledgeable enough about the facts in this case to effectively represent the defendant through a trial. Because of the condition induced by the above

mentioned drugs, affiant cannot competently represent the defendant through a trial.

"7. In addition to the above, because of the injury to my right eye, I am suffering impairment of vision and depth perception which causes me to experience vertigo at times.

"Further, affiant says not.

/s/_____
JAMES P. CANTILLON"

Subscribed and sworn
to before me this
7th day of August, 1974.
Thomas D. Mercola, Notary Public."

The affidavit of Warren O. Cagney, Jr., M.D., establishes his specialty - anesthesiology and the administration of all drugs thereof:

That Mr. Cantillon has been under medical care following a serious operation for diverticulitis, which requires a long post-operative recovery:

That Mr. Cantillon sustained a serious fall which required medication, Valium, Darmon and Dalmaine, respectively, three or four times a day, four times a day and at bedtime.

We have quoted in the Petition (p. 5 thereof), as to Doctor's opinion if an attorney attempted to represent a client while under the influence

of these drugs. He opined it could constitute malpractice.

The proffer of Mr. Cantillon to be examined was not exercised.

The Court apparently believed and concurred with the statement of Mr. Cantillon, for it stated (R. 2; p. 9, lines 12 through 14, also quoted in Petition p. 8):

> "THE COURT: I don't want anyone in this courtroom to think that I believe that you are misrepresenting the facts of your physical condition -- ."

In the Court's assessment of Mr. Cantillon's physical condition it therein concurred that Petitioner herein (defendant Galas) could not be effectively represented by Mr. Cantillon.

(b) The Solicitor General stated (Memorandum p. 2):

> "the result was that the taxpayer's whose returns Petitioner prepared -- " [Emphasis ours.]

That is a grievous solecism on the part of the Solicitor General that compounds the abuse of discretion by the trial Judge in denying a short continuance.

The indictment filed April 15, 1975 identifies four individuals, as allegedly having filed false and fraudulent income tax returns. These were:

Count One - Gilbert A. McAdams
Count Two - James R. Harris
Count Three - Edward A. Nevin
Count Four - Robert M. Crawford
(C.T. 1 - pp. 1 through 5.)

Mr. Stephen Wilson, Deputy United States Attorney, represented the Plaintiff at the trial.

He stated, in his opening address to the Jury (R. 2 - p. 24, lines 16-21):

> "I should mention, ladies and gentlemen, that with regard to the Schedule F on both Dr. McAdams' return and Dr. Harris' return, it was prepared by the Certified Public Accountant, Mr. Monroe ---."

Schedule F is part of the income tax of taxpayers reflecting the depreciation deductions, and is attached to the Income Tax Return of each of the above-named four individuals.

Plaintiff's EXHIBIT I - Tax Return of McAdams prepared by George O. Alger, 5-12-68

Plaintiff's EXHIBIT 22 - Tax Return of Harris prepared April 12, 1968 by Marvin J. Agee, Certified Public Accountant,

Whittier, California

Plaintiff's EXHIBIT 39 - Tax Return of Nevin prepared 3-16-69 by Ward O. Faoro, C.P.A.

Plaintiff's EXHIBIT 48 - Tax Return of Crawford prepared Apri. 14, 1969 (what appears) to be James Elmore & Associates, Certified Public Accountants.

Hence, neither the tax returns of said Four Individuals nor the Four Schedules "F" attached to the tax returns were prepared by Petitioner, as erroneously stated by the Solicitor General.

A study and survey of the Plaintiff's Exhibits confirm and verify that the Petitioner did not prepare either the tax returns or the attached Schedules "F".

(c) The Solicitor General (Memorandum pp. 3 and 4) quoted the statements of the trial court to Mr. Cantillon at the hearing on September 23, 1974, after the verdict of guilty had been returned.

The trial court stated that Mr. Cantillon was acting, and that for the record the Court felt Petitioner had a fine attorney, who did not suffer from anything that rendered him less than almost admirably capable of giving legal representation to his client.

Let us examine this inexplicable ambivalence in the statements made by the trial court in the presence of the Jury, and thereafter to Cantillon after the verdict.

It establishes by admission of the trial court that Mr. Cantillon was in an extremely debilitated mental condition. He was heavily medicated, suffering from vertigo, and his emotions and memory were affected from the use of the medication and from drugs he was taking (R. 2 - p. 7, lines 10 through 21).

The Judge accepted the statement from Mr. Cantillon as to his health, but appeared more concerned with having the matter heard at the earliest possible time rather than, as offered by Mr. Cantillon having him examined or Mr. Anthony interrogated to determine how effective they would be in representing Petitioner Galas (R. 2 - p. 7, line 2 through p. 15, line 8).

In fact, the court was repeatedly informed by Mr. Anthony that he was unprepared, had no knowledge of the facts of the case, and that Mr. Galas wanted Mr. Cantillon as the attorney of Petitioner's choice.

In fact, the trial Judge went so far as to point out when ordering Mr. Anthony to represent defendant Galas, that he (the trial Judge) would consider it negligence on the part of Mr. Cantillon if Mr. Anthony was not prepared to proceed with the case (R. 2 - p. 8, line 17).

Strangely, even though the trial court deemed it negligence if Mr. Anthony was not prepared, the court refused to make inquiry into the ability or extent to which Mr. Anthony was prepared.

It appears, therefore, the court had concluded Mr. Cantillon was in such a physical condition he could not proceed to trial by himself, that a backup counsel, who became primary counsel, interchangeably, was required. Mr. Anthony later requested a hearing to determine his preparedness (R. 2 - p. 73, lines 16 through 25; p. 74, lines 1 through 8).

The trial Judge was also influenced by another trial which was to start the following week in which Mr. Cantillon was one of counsel for defendants therein (R. 2 - p. 14, lines 23 through 25; p. 15, lines 1 through 8).

Finally, the Solicitor General points out, on the third day, the Court stated Mr. Cantillon's health had improved to such an extent he could excuse Mr. Anthony from the proceedings.

Thusly, at least until the third day, the Court feels the necessity for another attorney to take over or back up. The Record does not reflect when the Court suddenly felt a backup attorney was not needed. Further, there is no evidence to justify when a backup attorney was no longer needed.

It is clear that the order of the trial court that Mr. Anthony proceed, after Mr. Anthony advised the court that he was unprepared, did not cure or ameliorate the court's abuse of discretion in not granting a continuance as requested by Mr. Cantillon or a severance of defendant Galas.

In Calloway v. Powell, 393 F.2d 886 (1968) the court stated:

> "The right to counsel is the right to effective counsel . . . this court has interpreted counsel to mean 'not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonable effective assistance' . . . . Effective counsel includes familiarity of counsel with the case, and an opportunity to investigate it if necessary in order meaningfully to advise the accused of his option. . . . Under the circumstances revealed by this record it is apparent that appointed counsel surprised by being called to the arraignment, and having only a brief conference with the accused in the courtroom, did not measure up to the constitutional requirement."

Mr. Anthony told the Judge he was unprepared. He was confounded and surprised at being asked to represent Mr. Galas in a complex criminal proceeding.

In McKenna v. Ellis, 280 F.2d 592 (1960), the Fifth Circuit dealt with effective assistance of trial counsel. The trial Judge in absence of an attorney who was to appear, appointed two young attorneys to represent McKenna who was convicted.

The Fifth Circuit, in reversing, stated:

> " - - - He [the accused] is entitled to the effective, wholehearted assistance of counsel and to the undivided loyalty of counsel. Finally, he is entitled to have his trial guided by a Judge sensitive to the duty of protecting the accused's constitutional rights in all cases, but especially when fledgeling lawyers are appointed over the protest of the accused."

The court then continued:

> "[A] trial judge who appoints fledgeling attorneys as defense counsel, over defendant's protest, cannot wash his hands of their mistakes. . . ."

Another caveat was propounded in the Ellis case, at p. 601:

> " - - - A genuflection in the direction of justice by the pro forma appointment of counsel, such as McKenna had is something less than adequate judicial guidance and the furnishing of effective counsel to an accused."

The language cited by the Solicitor General, after the verdict, and given as a statement by the court to Mr. Cantillon (R. 6 - pp. 921-922) appear to be genuflections in the direction of justice, after thoughts, belated and do not, nunc pro tunc, cure the patent abuse of discretion of the trial judge in this case.

Although the trial court on two occasions denied the Petitioner the rights to be heard! - (R. 2 - p. 13, lines 16-18; and again R. 2 - p. 16, lines 16-21) during the court's colloquy on the immediacy of trial and colloquy with Mr. Cantillon, when the latter stated (R. 2 - p. 16, lines 8-10):

> "Mr. Cantillon: In our opinion Mr. Galas is being denied due process of law."

Nonetheless, the court (R. 2 - p. 121, lines 17-24) permitted Mr. Galas to join Mr. Cantillon and Mr. Anthony to inquire of any witness by cross-examination in behalf of the Petitioner.

The court at the same time alluded to the fact that Galas was a tax expert.

This statement by the trial court was made before a Jury and the court indicated it was based on evidence.

The only evidence given thereon was by the witness, Dr. McAdams, who stated under cross-examination by Mr. Shekoyan, attorney for defendant Crum (R. 2 - p. 81, lines 5-8) as

follows:

"Q. (By Mr. Shekoyan) It was your understanding in October of 1967 then that Mr. Galas was a tax lawyer?

"A. Yes."

Petitioner Galas in direct examination stated (R. 4 - p. 391, lines 9-18):

"Q. Have you ever held yourself out to be an expert in the law of taxation or tax.

"A. No, not as an expert in the sense that I would be a tax lawyer practicing before the tax court or anything of that sort, no.

"Q. Are you licensed to practice before the tax court?

"A. No.

"Q. Have you ever been?

"A. No."

The trial court drew an inference from McAdams' testimony that defendant Galas was a tax expert.

This presented a bias against Petitioner for it was serving Dr. McAdams' self-interest to

characterize Mr. Galas as a tax expert; therefore, Dr. McAdams would appear as innocent. He might legally have been a co-conspirator.

Moreover, an issue of fact arose by contradictory testimony which became a question for the Jury. The court's statement, in the presence of the jury represented a conclusion which the jury should not, but did accept, since the trial Judge so indicated.

Neither Mr. Cantillon nor Mr. Anthony objected or made a motion to strike the court's gratuitous statement.

Petitioner was not protected, at the most crucial moment, which if competently handled could have resuled in a directed verdict of acquittal of Petitioner.

a - Plaintiff's (in trial court) Exhibit 2, a Purchase Offer was presented to Dr. McAdams (R. 2 - p. 39, lines 19 through 26).

b - In response to questions by Mr. Wilson with respect to portions of said G.E. 2, Dr. McAdams (R. 2 - p. 40, lines 18-25) stated:

"A. Well, part of it was written by Mr. Crum. Part of it was written by Mr. Galas.

"Q. Can you be more specific as to which portion was written by Mr. Galas?" (R. 2 - p. 41, lines 1-9.)

"A. Yes, the top portion, including the figures and the total purchase price and so on was written by Mr. Galas, and the portion having to do with kits and how they would be owned was done by Mr. Crum." [Emphasis ours.]

"Q. When did you sign that document Exhibit 2, Doctor?

"A. April 9, 1968."

Mr. Galas testified, on cross-examination by Mr. Wilson, United States Attorney (R. 4 - p. 446, lines 11-25):

"Q. And this purchase offer that Dr. McAdams signed, that would be Government's Exhibit 2, if you would like, you may look at it, Sir." (Whereupon Exhibit placed before the witness.)

By Mr. Wilson:

"Q. Did you prepare that purchase offer?

"A. No.

"Q. You will note part of the purchase offer is printed and part is written; did you perform any of the writing on that agreement?

"A. None whatsoever.

"Q. Nothing on that Agreement is yours.

"A. None whatsoever, no part of it."

Without his debility, accidently occurring, Mr. Cantillon, commensurate with his ability, would have on this phase, of this testimony by Dr. McAdams on cross-examination of him, in depth and detail, requested and invoked handwriting experts, who would readily establish the handwriting on G.E. 2, the purchase offer.

It is climactic and would have been determinative of Petitioner's position; present counsel sincerely believes that Dr. McAdams was overzealous in testifying that Petitioner did write on G.E. 2, which Petitioner steadfastly denies. The truth as to said actual handwriting presented to the jury by experts would easily resolve the matter since, certainly, the handwriting can be determined and would have been with specificity, if Petitioner's counsel had been effective and not suffering and ingested with drugs, rendering him ineffective and not competent for the trial.

III

THE CASES CITED BY THE SOLICITOR GENERAL ARE INAPPLICABLE ON THE FACTS AND LAW OF THIS CASE

(a) United States v. Makley,
(1972) 468 Fed.2d 916

Defendant contended that trial court abused its discretion in denying his motion for a continuance or a mistrial due to his alleged surprise when a codefendant testified for the prosecution. The Appellate Court stated (p. 917):

> "Neither by motion for new trial nor otherwise did Makley demonstrate any such sufficient prejudice resulting from the District Court's denial of his motion as to induce us to hold that an abuse of discretion occurred."

In the instant matter, the Record is replete with motions for a new trial, on all the grounds raised during the trial, which were denied.

To a large extent, this is tantamount to a case of first impression. Competent counsel, by accident two days before trial, is rendered ineffective and incompetent, due to injury, medicine and drugs required medically to be taken. Under oath, he admits his vertigo,

dizziness, loss of memory, must sit down, cannot check Exhibits, in fact cannot function compatible with the necessity; as a result, defendant is in a dilemma, with one counsel, unprepared, not of his choice, counsel of his choice, ineffective through no fault of his own; a colloquy before a jury which unquestionably prejudices defendant's case; in fact, the trial is a hodge-podge. The denial of a short continuance in this matter clearly represents an abuse of discretion by the trial Judge.

(b) United States v. Young,
(1972) 470 F.2d 962, 964 (C.A. 9)
cert. denied 410 U.S. 967 and
cases cited therein.

This case is silent as to the basis of a continuance; at page 964, the Court states:

> "Motions for continuance are within the sound discretion of the trial judge,"

and cites cases enunciating the general law.

But where there is a constitutional violation, as in this instant case, a denial of effective counsel, a request for a continuance for a short period is not for delay, but in the interests of constitutional justice; and a denial of the continuance, in this matter, represents an abuse of discretion by the trial Judge.

It is presumed the request for continuance in the Young case was predicated on the failure

to give the defendant a list of government witnesses prior to the day of trial. The Court, again, in the Young case, held that the government is not obliged to disclose the names of its witnesses, citing cases.

In the cases cited with respect to continuances (p. 964) of the Young case, the motions were based on standard reasons, none of which involved a clear abuse of the trial judge's discretion, as is clearly evident, in proliferation, in the present matter, as evinced in the entire Record.

(c) United States v. Casey, (1973) 480 F.2d 151

The Appellate Court stated (p. 152):

> "On the day of trial Mr. Casey employed an attorney for the sole and limited purpose of entering a motion for a continuance.
>
> "We agree with the lower court that Casey had a reasonable time to procure counsel and was financially able to do so.

The facts nor law are pertinent to this case.

But the language and citation by the Fifth Circuit in the Casey report is pertinent and applicable to the facts and law in this matter.

At page 152, in a Per Curiam opinion, the Fifth Circuit Court stated:

> "The facts of a particular case determine whether or not the denial of a request for a continuance to to obtain counsel is a violation of a person's Sixth Amendment Guarantee. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)."

In Ungar v. Sarafite, 376 U.S. 575 (1964) at p. 589, the Court refers to the case of Chandler v. Fertag, 348 U.S. 3, as authority for, "contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

In the Petition for a Writ of Certiorari (at page 15), we cited the case of Reynolds v. Cochran, 365 U.S. 526, 31 S.Ct. 723, which, in turn cited the case of Chandler v. Fertag (1954) 348 U.S. 3, which held "emphatically clear that a person proceeded against as a multiple offender has a constitutional right to the assistance of his own counsel in that proceeding."

The Chandler v. Fertag case stated (at page 9):

> "Regardless of whether Petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."

(at page 10)

> "By denying Petitioner any opportunity to employ and consult with counsel --- to obtain counsel ---, the trial court deprived him of due process of law guaranteed by the Fourteenth Amendment."

May we paraphrase:

By denying Petitioner herein, through his counsel of his choice, a short continuance to render him competent and effective, having become disabled physically two days before trial, and by medicine and drugs prescribed by a doctor for his accident and condition, the trial court deprived him of assistance of effective counsel and of due process as guaranteed by the Fourteenth Amendment.

Counsel for Petitioner did not desire the accident, the injury, the discomfiture and inability to function effectively; the Record is eloquent on his ineffectiveness due to his injury and required intake of drugs and medicine. There was an effective abuse of discretion by the trial court in denying a short continuance or severance.

IV

CONCLUSION

For all of the reasons hereinabove set forth, factual and legal, it is respectfully submitted that judgment be set aside as to all four counts, and the conviction reversed.

Dated: March 1, 1976

Respectfully submitted,

HERBERT E. SELWYN

Attorney for Petitioner